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In the Supreme Court of the United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC., PETITIONER

v.

BYRON GIZONI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a maritime employee whose occupation is one of those enumerated in the Longshore and Harbor Workers' Compensation Act may be a seaman within the meaning of the Jones Act.

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INTEREST OF THE UNITED STATES

The Secretary of Labor administers the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901-950. See 33 U.S.C. 939. The Secretary has delegated her responsibilities under the LHWCA to the Director of the Office of Workers' Compensation Programs (OWCP), who administers the Act pursuant to regulations codified at 20 C.F.R. Pts. 701-704. The Director is a party to and may participate in any proceedings under the LHWCA.

This case presents the question whether an employee whose occupation is one of those enumerated in Section 2(3) of the LHWCA, 33 U.S.C. 902(3), may nevertheless be a "master or member of a crew

of any vessel" eligible for a remedy under the Jones Act, 46 U.S.C. App. 688, rather than under the LHWCA. Resolution of this issue will affect federal policy concerning the scope of the LHWCA, as well as administration of the Act by the Secretary of Labor. The United States therefore has a substantial interest in this case.

STATEMENT

1. The LHWCA is a workers' compensation statute that applies to certain employees injured in the course of maritime employment "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. 903(a). Section 2(3) of the LHWCA defines an "employee" covered by the Act as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, *but such term does not include* * * * *a master or member of a crew of any vessel.*

33 U.S.C. 902(3) (emphasis added). An employer's liability under the LHWCA is "exclusive and in place of all other liability of such employer to the employee * * * at law or in admiralty." 33 U.S.C. 905(a).

This Court recently concluded that a "master or member of a crew of any vessel" within the meaning of the LHWCA is the equivalent of a "seaman" under the Jones Act. See *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807, 813-814 (1991). The Jones Act, in turn, provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury." 46 U.S.C. App. 688.

2. Petitioner Southwest Marine, Inc., operates a ship repair facility in San Diego. Petitioner owns several structures that are used in ship repair and that the court of appeals characterized as "floating platforms."[1] Pet. App. II-2. These floating platforms are used to carry "equipment, materials, supplies, and vessel components around the shipyard and on to and off of vessels being repaired." *Ibid.* They have no motive power or navigational aids of their own, but are moved into place by tugs. Once secured alongside a vessel, the platforms support ship repairmen engaged in their work. *Ibid.*

Petitioner employed respondent as a rigging foreman. Respondent rode the floating platforms as they were towed into place and performed his work while on board. Respondent sometimes "served as a lookout and gave maneuvering signals to the tugboat operator" when the platforms were moved. Pet. App. II-2. He also received lines from the ships' crews to secure the platforms to the vessels being repaired. He alleges that he was injured when his foot broke through a piece of wood covering a hole in the deck of a floating platform as it was transporting a rudder from the shipyard to a floating drydock. *Id.* at II-2 to II-3.

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[1] Respondent characterizes these structures as "barges." Br. in Opp. 6. The district court characterized them as "floating platforms," Pet. App. I-2, and as "barge floats," *id.* at III-9. Petitioner itself has referred to one of the structures as a "pontoon barge." J.A. V-2.

Respondent submitted a claim for and received benefits from petitioner under the LHWCA.[2] He later filed this action against petitioner under the Jones Act, alleging that he was a seaman injured as a result of his employer's negligence. Pet. App. II-3. Respondent also asserted claims for unseaworthiness and maintenance and cure. J.A. IV-4 to IV-5. Respondent alleged that petitioner owned and operated "a group of vessels including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge in navigable waters." J.A. IV-3. He further alleged that, as a rigging foreman, he was "permanently assigned to said group of vessels," and thus was a Jones Act seaman. *Ibid.*

The district court granted petitioner's motion for summary judgment. Pet. App. I-1 to I-2. The court held that petitioner's floating platforms were not vessels in navigation to which respondent was permanently attached, and that respondent was not aboard primarily for the purpose of navigation. *Ibid.*; *id.* at

[2] The LHWCA provides for two methods of receiving compensation. The employer must pay benefits "periodically, promptly and directly * * * without an award" unless it controverts its liability for such compensation. 33 U.S.C. 914(a). See also 20 C.F.R. 702.211, 702.231. If the employer controverts the employee's right to compensation, the deputy commissioner must take action to "protect the rights of all parties." 33 U.S.C. 914(d). The deputy commissioner may dispose of the case informally, see 20 C.F.R. 701.301(7), 702.311-315, or by issuing a formal compensation order with the consent of the parties, 20 C.F.R. 702.315. In cases that require an evidentiary hearing, see 33 U.S.C. 914(h); 20 C.F.R. 702.316, 702.351, an administrative law judge issues a final decision and order. 20 C.F.R. 702.348. In this case, petitioner voluntarily paid respondent benefits under the LHWCA. Consequently, there was no compensation order or adjudication of respondent's entitlement to benefits under the LHWCA.

III-8 to III-9. In addition, the district court concluded that "plaintiff, as a harbor worker, is precluded from bringing this action by the exclusive remedy provisions of the [LHWCA]." *Id.* at I-2.

3. The court of appeals reversed. Pet. App. II. It observed that "[w]hether a claimant is a seaman is typically a question for the jury, where there is an evidentiary basis for such a finding." *Id.* at II-3. In this case, the court found there was a sufficient basis for allowing a jury to determine whether respondent was a seaman. The court relied on its prior decision in *Estate of Wenzel* v. *Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983), which concerned a diver who worked aboard a submerged cleaning and maintenance platform. The court of appeals concluded that this case, like *Wenzel*, presents "close questions of fact which should have been determined by the jury." Pet. App. II-4. In particular, the court said, respondent was entitled to have a jury decide whether the floating platforms are vessels, whether respondent had a permanent relationship to the platforms, and whether he aided in their navigation. *Ibid.*

The court of appeals rejected the district court's holding that, as a matter of law, respondent was covered by the LHWCA rather than the Jones Act. The court recognized that the LHWCA, where it applies, is the employee's exclusive remedy for an injury in the course of maritime employment. Pet. App. II-5 (citing 33 U.S.C. 905(a)). But, the court observed, "by its terms, the LHWCA does not cover 'a master or member of a crew of any vessel,'" which is "the equivalent of 'seaman' in the Jones Act." Pet. App. II-6. Consequently, the court of appeals reasoned that "[w]hether an employee is covered by the

LHWCA or the Jones Act should be determined by looking to the nature of the claimant's work and the intent of Congress in enacting these compensation[] schemes, not by looking to the claimant's job title." 909 F.2d at 389.[3] Accordingly, the court held that respondent's status as a ship repairman, one of the occupations enumerated in Section 2(3) of the LHWCA, 33 U.S.C. 902(3), did not preclude him from seeking damages under the Jones Act. Pet. App. II-6.

SUMMARY OF ARGUMENT

Section 2(3) of the LHWCA, which defines the class of employees covered by that Act, expressly excludes from coverage "a master or a member of a crew of any vessel." 33 U.S.C. 902(3)(G). This Court recently concluded that a "master or member of a crew of any vessel" is the equivalent of a Jones Act seaman. *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807 (1991). *Wilander* held, moreover, that "[i]t is not the employee's particular job that is determinative [of seaman status], but the employee's connection to a vessel." *Id.* at 817. Because a ship repairman may spend all or most of his working hours aboard a vessel (including a special-purpose vessel used exclusively in ship repair), in furtherance of that vessel's mission, such a worker may qualify as a Jones Act seaman.

Petitioner's contention that ship repairmen, shipbuilders, and ship breakers should be conclusively presumed not to be Jones Act seamen ignores the LHWCA's express language excluding from coverage a "master or member of a crew of any vessel." And because Congress's enumeration of certain occupa-

[3] This sentence is misquoted at Pet. App. II-6.

tional categories was not intended to be exhaustive, petitioners' approach would draw an irrational distinction between those in the enumerated categories (longshoremen, ship repairmen, shipbuilders, and ship-breakers) and other maritime employees. Petitioner incorrectly relies on cases holding that certain injured railroad workers who would otherwise have a remedy under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, are instead covered by the exclusive remedial provisions of the LHWCA. These cases are readily distinguishable because the LHWCA contains no express exclusion for railroad workers comparable to the exclusion of Section 2(3)(G) for crew members.

The legislative history confirms that Congress did not intend to deprive seamen of their traditional remedies for personal injury. The original LHWCA, which applied only to longshore and harbor workers injured on navigable waters, expressly excluded from its coverage a "master or member of the crew of any vessel." When the 1972 amendments to the LHWCA extended coverage to certain maritime workers injured on land, Congress limited the categories of land-based employees covered by the LHWCA by specifying that they must be engaged in maritime employment. But in extending the LHWCA to certain additional categories of land-based workers, Congress did not intend to deprive sea-based workers of their traditional seamen's remedy under the Jones Act.

Petitioner's policy-based arguments cannot alter the LHWCA's plain language. Moreover, petitioner is wrong in suggesting that an injured worker may receive a "double recovery" under both the LHWCA and the Jones Act. It is well settled that any compensation received under the LHWCA will be credited

against a subsequent Jones Act award, and any amounts paid to an employee pursuant to the Jones Act must be credited against any subsequent liability imposed under the LHWCA. Because employees cannot receive a double recovery, it is not clear why employers should be required to pay double insurance premiums. The Court rejected a similar "double insurance" argument in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 725 (1980).

Nor is petitioner or its amicus correct in arguing that an employee should be precluded from pursuing a claim under the Jones Act simply because he has also filed a claim under the LHWCA. Under established principles of issue preclusion, only if the question is actually litigated, and it is *adjudicated* that an employee is not a member of a crew of any vessel, is relitigation of that issue barred in an action under the Jones Act.

Petitioner's novel suggestion that the Department of Labor should exercise primary jurisdiction over the question whether a maritime employee is a seaman is outside the scope of the question presented for review and, in any event, is without merit. Petitioner's reliance, in support of this suggestion, on the exclusive remedy provision of the Federal Employees Compensation Act (FECA), 5 U.S.C. 8116(c), is completely misplaced. The courts defer to the Secretary of Labor to determine whether an employee is covered under FECA because that statute, unlike the LHWCA, confers on the Secretary exclusive and unreviewable authority to decide coverage questions.

ARGUMENT

I. JONES ACT SEAMEN ARE EXPRESSLY EXCLUDED FROM COVERAGE UNDER THE LHWCA

A. The LHWCA's Definition of "Employee," as Construed in *Wilander*, Excludes Jones Act Seamen

By its terms, the LHWCA applies to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker," but *not* to "a master or member of a crew of any vessel." 33 U.S.C. 902(3). Congress could not have stated more clearly that "a master or a member of a crew of any vessel" is not within the scope of the LHWCA.

In *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807 (1991), this Court recognized that a "master or member of a crew of any vessel" under the LHWCA is equivalent to a Jones Act seaman. The Court observed that

> "master or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

111 S. Ct. at 813. The Court added that " 'master or member of a crew' restates who a 'seaman' under the Jones Act is supposed to be: a sea-based maritime employee." *Id.* at 814.

In *Wilander*, the Court concluded that "the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a

vessel in navigation." 111 S. Ct. at 817. Accordingly, the Court held that "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Ibid.* The Court viewed this rule as consistent with "Congress' land-based/sea-based distinction" between the LHWCA and the Jones Act. *Ibid.* Because the Jones Act was intended to address "the special hazards and disadvantages to which they who go down to the sea in ships are subjected," *ibid.* (quoting *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)), the Court said that "it is not the employee's particular job that is determinative, but the employee's connection to a vessel."[4] 111 S. Ct. at 817.

Thus, the plain language of the LHWCA excludes from its coverage any "master or member of a crew of any vessel"—*i.e.*, any Jones Act seaman. As the Court observed in *Wilander*, "[t]here is no indication in the Jones Act, the LHWCA, or elsewhere, that Congress has excluded from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea, but who do not aid in navigation." 111 S. Ct. at 817. Accordingly, if respondent has the requisite connection to a vessel in navigation, he is entitled to

[4] *Wilander* generally approved the Fifth Circuit's test for determining seaman status, which focuses on whether an employee was "assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport but designed to float on water)" and whether the employee "contributed to the function of the vessel or the accomplishment of its mission." *Offshore Co.* v. *Robison*, 266 F.2d 769, 779 (1959) (Wisdom, J.); see also *Barrett* v. *Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1073 (1986) (en banc).

the remedies available to seamen rather than the benefits provided by the LHWCA.[5]

[5] Petitioner (Pet. Br. 45-48) and its amicus (Shipbuilders Council Br. 17-20) contend that, as a matter of law, respondent lacked sufficient connection to a vessel in navigation to qualify for seaman status. This contention is not within the question on which the Court granted certiorari. See Sup. Ct. R. 24.1(a). In any event, we believe that the question whether respondent's special-purpose structures may be "vessels" is properly one to be determined as a question of fact. The courts of appeals have held that a "vessel" can be virtually any structure that has as its purpose and business, to some reasonable degree, "the transportation of passengers, cargo, or equipment from place to place across navigable waters." *Johnson* v. *John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984) (quoting *Bennett* v. *Perini Corp.*, 510 F.2d 114, 116 (1st Cir. 1975), cert. denied, 469 U.S. 1211 (1985)). See also *Cook* v. *Belden Concrete Prods., Inc.*, 472 F.2d 999, 1001 (5th Cir.), cert. denied, 414 U.S. 868 (1973); *Producers Drilling Co.* v. *Gray*, 361 F.2d 432, 437 (5th Cir. 1966). In addition, this Court has generally taken an expansive view of what constitutes a "vessel." See *Norton* v. *Warner Co.*, 321 U.S. 565, 571 (1944); *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370, 372 (1957); *Gianfala* v. *Texas Co.*, 350 U.S. 879, rev'g 222 F.2d 382 (5th Cir. 1955); *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 416 n.2 (1985). See also 1 U.S.C. 3.

Similarly, the question whether respondent had the requisite connection to vessels in navigation is, in our view, one to be determined by the trier of fact. Respondent alleged that he was "permanently assigned" to a "group of vessels" J.A. IV-3. A seaman need not have an invariable connection to a single vessel. *Ardoin* v. *J. Ray McDermott & Co.*, 641 F.2d 277, 281 (5th Cir. 1981) (collecting cases). And contrary to the suggestion of the Shipbuilders Council (Br. 17), seaman status has never turned on whether the employee sleeps aboard the vessel. See, *e.g.*, *Senko*, 352 U.S. at 372; *Gianfala*, 350 U.S. 879; *Ardoin*, 641 F.2d at 282 ("[M]erely sleeping and eating aboard a support vessel while working on a fixed platform does not make one a seaman * * *. Nor does a failure to do so deprive one of seaman's status.").

B. Petitioner's Exclusive Focus on Job Title Conflicts With The Language of the LHWCA

Petitioner asserts (Pet. Br. 15-25) that respondent was a "land-based employee" covered by the LHWCA as a matter of law because his occupation was one of those enumerated in Section 2(3) of that Act. In support of this position, petitioner relies on *Pizzitolo* v. *Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988). In *Pizzitolo*, the Fifth Circuit said that maritime workers whose occupations are enumerated in Section 902(3) are "unqualifiedly covered by the LHWCA and therefore ineligible for benefits under the Jones Act." 812 F.2d at 982. *Pizzitolo* has not been followed by other circuits, and appears to be a doubtful precedent even within the Fifth Circuit.[6] Because *Pizzitolo*'s approach is contrary to the language of the LHWCA, it should be rejected.

In addition to limiting coverage to injuries that occur on navigable waters or certain areas adjoining navigable waters (the "situs test"), the LHWCA establishes a "status test" to determine coverage under the Act. To pass the "status test," a covered employee must be (1) engaged in "maritime employ-

[6] In a subsequent case, the Fifth Circuit granted rehearing en banc to address the tension between *Robison* and *Pizzitolo*, but the parties subsequently settled the case. *Legros* v. *Panther Services Group, Inc.*, 863 F.2d 345 (1988), reh'g en banc granted, 863 F.2d 355, appeal dismissed, 874 F.2d 954 (1989). See *Chauvin* v. *Sanford Offshore Salvage, Inc.*, 868 F.2d 735, 739 n.14 (5th Cir. 1989). In addition, the Fifth Circuit has tended to analyze cases under both *Robison* and *Pizzitolo* in order to verify that the outcome is the same under both approaches. See, *e.g.*, *Leonard* v. *Dixie Well Service & Supply, Inc.*, 828 F.2d 291 (1987); *Thibodeaux* v. *Torch, Inc.*, 858 F.2d 1048, 1050 (1988).

ment, including * * * [but not limited to] a ship repairman, shipbuilder, and ship-breaker," 33 U.S.C. 902(3), *and* (2) not fall within any of the exclusions of Section 2(3)(A)-(H), including the exclusion for a "master or member of a crew of any vessel," 33 U.S.C. 902(3)(G). Only employees who satisfy *both* parts of the status test are covered by the LHWCA.[7]

Petitioner's contention is flawed for an additional reason. The enumeration of occupations in Section 902(3) is not exhaustive. See *Chesapeake & Ohio Ry.* v. *Schwalb*, 110 S. Ct. 381, 384 (1989); *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985). Thus, petitioner's argument, which would apply a conclusive presumption of LHWCA coverage to ship repairmen, shipbuilders, and ship-breakers, would draw an irrational distinction between workers in those occupations and other land-based maritime workers. There is no indication that Congress intended to draw any such distinction.

Of course, a ship repairman may lack the requisite connection to a vessel in navigation to qualify for seaman status. See *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 80-81 (1979) (noting that "30%-35% of ship repair work is done on land"). The mere fact that a ship repairman performs some of his work on water does not make him a seaman, but a ship repairman *may* spend all or most of his working hours aboard a vessel (or vessels), in furtherance

[7] Petitioner does not suggest that the other express exclusions of Section 2(3)—such as the exclusion for "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet," 33 U.S.C. 902(3)(B), or for "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length," 33 U.S.C. 902(3)(F) should be so ignored.

of the vessel's mission. In such circumstances, the employee may meet the test for seaman status, since that test turns on employees' work-related connection to a vessel in navigation, "regardless of the particular job they perform." See *Wilander*, 111 S. Ct. at 817. Consequently, job title alone cannot determine whether an employee is a seaman covered by the Jones Act or a harbor-worker covered by the LHWCA.[8]

C. The FELA Cases Do Not Support Petitioner's Position

Petitioner contends (Pet. Br. 31-33) that the court of appeals' decision in this case conflicts with decisions holding that the LHWCA provides the exclusive remedy for certain injured railroad workers who would otherwise be covered by the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.* See *Chesapeake & Ohio Ry.* v. *Schwalb*, 110 S. Ct. 381 (1989); *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334 (1953). Petitioner's reliance on these cases is misplaced. The LHWCA applies to certain railroad

[8] Courts look to actual job content rather than job title under other remedial statutes designed to protect workers. See, *e.g.*, *Brennan* v. *Western Union Tel. Co.*, 561 F.2d 477 (3d Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*); *Hodgson* v. *The Klages Coal & Ice Co.*, 435 F.2d 377 (6th Cir.) (same), cert. denied, 412 U.S. 973 (1970); *Forsberg* v. *Pacific N.W. Bell Tel. Co.*, 840 F.2d 1409 (9th Cir. 1988) (Equal Pay Act of 1963, 29 U.S.C. 206(d)); *Epstein* v. *Secretary, United States Dep't of Treasury*, 739 F.2d 274 (7th Cir. 1984) (same); *Fountain* v. *Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991) (Age Discrimination in Employment Act of 1967, 29 U.S.C. 621). An exclusive focus on job title would allow employers to affect coverage determinations by manipulating job titles.

workers (and therefore provides their exclusive remedy) because the LHWCA contains no exclusion for railroad workers comparable to the exclusion of Section 2(3)(G) for Jones Act seamen. Indeed, the FELA analogy demonstrates that petitioner's position cannot be squared with the language of the LHWCA. Petitioner would treat Jones Act seamen, who are expressly excluded from the LHWCA's definition of "employee," in the same manner as railroad workers, who are not so excluded. That result can be reached only by ignoring the language of the LHWCA.[9]

II. NEITHER THE LEGISLATIVE HISTORY OF THE LHWCA, NOR THIS COURT'S PRIOR DECISIONS, SUGGEST THAT CONGRESS INTENDED TO DISPLACE THE TRADITIONAL REMEDIES AVAILABLE TO SEAMEN

A. The Legislative History Confirms That Congress Did Not Intend to Deprive Seamen of Their Traditional Remedies for Personal Injury

The legislative history of the LHWCA provides no support for petitioner's assertion (Pet. Br. 24) that Congress intended "to sweep employees in occupations enumerated in the LHWCA within the exclusive coverage of the LHWCA." Instead, the legislative history confirms that Congress intended to exclude seamen from coverage under the LHWCA. In 1972, Congress extended the LHWCA to injuries that

[9] Contrary to petitioner's assertion (Pet. Br. 5), Section 5(a) of the LHWCA (the "exclusivity provision") does not itself provide that all maritime employees engaged in enumerated occupations are covered by the LHWCA. Section 5(a) provides only that, where the LHWCA applies, it is exclusive; it says nothing about the scope of the LHWCA.

occur on land adjacent to navigable waters. That expansion of remedies was not intended to deprive seamen of their traditional remedies under the Jones Act and general maritime law.

1. *The Original LHWCA Did Not Apply to Seamen*

In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), this Court held that the States could not constitutionally extend their workers' compensation systems to longshore workers injured on navigable waters. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256-257 (1977); *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 117-118 (1962). Following *Jensen*, "[t]he line of demarcation between land and water became known as the *Jensen* line." *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297, 306 (1983). Congress enacted the LHWCA in 1927 to fill the gap in workers' compensation coverage that resulted from *Jensen*. *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 72 (1979). The original Act excepted from its coverage a "master or member of a crew of any vessel," ch. 509, § 2(3), 44 Stat. 1425, because representatives of maritime employees successfully argued that the Jones Act and other traditional admiralty remedies generally provide superior relief. See *Boatel, Inc.* v. *Delamore*, 379 F.2d 850, 856 (5th Cir. 1967) (citing *Norton* v. *Warner Co.*, 321 U.S. 565 (1944)). This Court has recognized a duty "not [to] permit the exception to be narrowed whether by administrative construction or otherwise." *Id.* at 571.

2. *The 1972 Amendments to the LHWCA Did Not Restrict the Remedies Available to Seamen*

The original LHWCA "stopped at the water's edge." *Caputo*, 432 U.S. at 259. With the advent of modern containerized shipping, however, longshoring functions traditionally performed aboard ship came to be

performed on land. *Ford*, 444 U.S. at 74. Once again, therefore, coverage under the LHWCA depended on which side of the *Jensen* line a longshore worker's injury occurred. In *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969), this Court noted the advantages of a uniform system of compensation benefits for longshore workers on both sides of the *Jensen* line, but said that the "invitation to move that line landward must be addressed to Congress, not to this Court." *Id.* at 224.

In 1972, Congress accepted the invitation by enacting amendments to the LHWCA. "Whereas prior to 1972 the Act reached only accidents occurring on navigable waters, the amended 33 U.S.C. § 903 expressly extended coverage to 'adjoining area[s]'" on land. *Herb's Welding, Inc.* v. *Gray*, 470 U.S. at 420. The 1972 amendments "were not meant 'to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.'" *Id.* at 424 (quoting H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11 (1972)). For example, truck drivers and clerical workers, although performing their work on the newly expanded site of coverage, are not covered by the LHWCA, because they are not engaged in "loading, unloading, repairing, or building a vessel." S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972). See also *Caputo*, 432 U.S. at 266-267; *Perini*, 459 U.S. at 318. Thus, when the definition of "navigable waters" was broadened to include land-based sites, "it became necessary to describe affirmatively the class of workers Congress desired to compensate." *Caputo*, 432 U.S. at 264.[10]

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[10] In the course of its deliberations on the 1972 amendments, Congress rejected S. 1547, 92d Cong., 1st Sess. (1971), a bill that would have made the LHWCA the exclusive remedy

This legislative history provides no basis for concluding that, in enumerating certain occupations in Section 2(3), Congress intended to limit the remedies traditionally available to seamen. On the contrary, Congress retained the express exclusion for masters or members of the crew of any vessel. See *Caputo*, 432 U.S. at 264 n.22.[11]

B. Petitioner's Approach Is Inconsistent With the Remedial Purposes of the LHWCA and the Jones Act

The Jones Act, like the LHWCA, "is a remedial statute," *Wilander*, 111 S. Ct. at 814; the Court has recognized an "obligation not to narrow unduly the

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for offshore oil workers. See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 418-420 (1972) (statement of Joseph M. Shelton); *id.* at 602 (statement of John R. Martzell). The bill was opposed on the ground that it would relegate an entire class of workers traditionally treated as crew members to the less advantageous remedy available under the LHWCA. See *id.* at 589-590 (statement of Maritime Trades Dep't, AFL-CIO). See also *Herb's Welding, Inc.*, 470 U.S. at 420 n.5.

[11] Petitioner's reliance (Pet. Br. 37-39) on the 1984 amendments to the LHWCA is similarly misplaced. The 1984 amendments prohibit negligence actions by ship repairmen, ship builders, and ship-breakers (but not longshore workers) against employers who happen to own the vessel on which they are injured. See H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1, at 7 (1983). Because the 1984 amendments do not bar negligence actions against employer-owners, the amendments do not reflect an across-the-board intent to limit the employer's liability. In any event, the 1984 amendments concern only the remedies available to employees covered by the LHWCA. They do not affect the definition of a covered employee.

class for whom Congress provided recovery under the Jones Act," *id.* at 815. Although the LHWCA generally is interpreted broadly to further its remedial purposes, see, *e.g.*, *Caputo*, 432 U.S. at 268, it is not appropriate to construe the LHWCA to supplant remedies under the Jones Act, which is itsel a federal remedial statute that must be given broad effect. As Judge Wisdom noted in *Robison*, "[t]he process of liberal construction of the Jones Act cannot now be ignored because Congress has seen fit to pass the Longshoremen's Act." 266 F.2d at 774 (quoting *Carumbo* v. *Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941)).[12]

In *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715 (1980), this Court held that the 1972 amendments to the LHWCA did not supplant state workers' compensation remedies previously available to injured workers. Because the "thrust of the amendments was to 'upgrade the benefits,'" *id.* at 723 (quoting S. Rep. No. 1125, *supra*, at 1), the Court declined to preempt state remedies in the name of "uniformity." 447 U.S. at 726. It is at least as clear that the 1972 amendments were not designed to deny maritime employees the Jones Act remedy to which they were previously entitled.[13]

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[12] It is true that the LHWCA, like most workers' compensation statutes, struck a balance between the interests of workers and their employers. See *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 635-636 (1983). But the balance was not struck to the detriment of Jones Act seamen. On the contrary, Congress expressly excluded crew members from the scope of the LHWCA.

[13] We recognize that the court of appeals' decision would leave one category of employees—crew members whose employers are not negligent—without a remedy under either the Jones Act or the LHWCA. But this is simply a consequence

C. This Court's Decisions Construing the 1972 Amendments Do Not Support Petitioner's Position

Contrary to petitioner's contentions (Pet. Br. 20-25), this Court's prior decisions construing the 1972 amendments do not support a different reading of the statute or its legislative history. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), held that a worker who checked and marked cargo at a pier, and a terminal laborer who loaded and unloaded containers, barges, and trucks, were covered by the LHWCA. Similarly, *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 (1979), held that employees who performed the "intermediate steps of moving cargo between ship and land transportation" were engaged in maritime employment. *Id.* at 82. The Court's central concern in both *Caputo* and *Ford* was to interpret the status requirement in a way that eliminated Congress's "concern[] that some workers might walk in and out of [federal] coverage" depending upon the fortuity of whether they worked on land or water. *Ford*, 444 U.S. at 83 n.18. Congress's decision to eliminate the significance of the *Jensen* line for land-based workers does not imply a decision to restrict the remedies available to seamen. On the contrary, as the Court noted in *Caputo*, 432 U.S. at

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of providing the same treatment for all maritime employees who meet the "seaman status" test for coverage under the Jones Act. We also note that the Jones Act generally has not been held to require seamen to show a high degree of negligence, see, *e.g.*, *Bennett* v. *Perini Corp.*, 510 F.2d 114, 117-118 (1st Cir. 1975), and that a seaman unable to establish liability under the Jones Act may nevertheless be able to pursue claims for unseaworthiness (which does not require proof of negligience, see *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946)), or for maintenance and cure.

264 n.22, Congress retained the express exclusion for crew members.

In *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297 (1983), the Court refused to revive the "maritime but local" distinction to mark a dividing line between federal and state compensation systems. The Court found nothing in the 1972 amendments or their legislative history to "indicate that Congress intended to withdraw coverage from employees injured on the navigable waters in the course of their employment as that coverage existed before the 1972 Amendments." *Id.* at 325. The Court was careful to note that a worker injured on navigable waters "satisfies the status requirement in § 2(3), and is covered under the LHWCA, providing, of course, that he * * * is not excluded by any other provision of the Act." *Id.* at 324.[14]

III. PETITIONER'S POLICY-BASED ARGUMENTS ARE UNPERSUASIVE

Petitioner argues (Pet. 8) that the court of appeals' decision will impose "an unreasonable economic burden" on financially troubled employers. The short answer to this argument, as well as to petitioner's other policy-based arguments, is that it cannot alter the plain language of the LHWCA. In any event, petitioner's policy arguments fail on their own merits.

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[14] Contrary to petitioner's contention (Pet. Br. 24 n.85), *Perini* does not conflict with *Wilander*, because there was no evidence that the injured worker had the requisite connection to a vessel to qualify as a Jones Act seaman.

A. The Court of Appeals' Decision Will Not Lead to Double Recoveries

Petitioner states (Pet. Br. 12) that the court of appeals' decision "allows an injured worker to possibly receive both a jury award and a LHWCA remedy, despite Congress' intention that he receive one or the other, but not both." If petitioner is suggesting that there may be a double recovery, the suggestion is flatly wrong. Any benefits paid by an employer under the LHWCA are credited against a subsequent Jones Act award. See *Simms* v. *Valley Line Co.*, 709 F.2d 409, 412 n.3 (5th Cir. 1983); 4 A. Larson, *Workmen's Compensation Law* § 90.51(a), at 16-508 to 16-509 & n.86 (1990) (collecting cases). Because the LHWCA and Jones Act are mutually exclusive, "[n]o problem of double recovery is involved: the compensation payments [under the LHWCA] will be routinely deducted from the damage recovery if the Jones Act action is successful." G. Gilmore & C. Black, *The Law of Admiralty* § 6-52, at 435 (2d ed. 1975). Cf. *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 725 n.8 (1980) ("Of course, there is no danger of double recovery under concurrent [federal and state] jurisdiction since employers' awards under one compensation scheme would be credited against any recovery under the second scheme."). Moreover, Section 3(e) of the LHWCA provides that any amounts paid to an employee "pursuant to" the Jones Act "shall be credited against any liability imposed" under the LHWCA. 33 U.S.C. 903(e).

Petitioner also argues (Pet. Br. 5) that the court of appeals' decision will compel employers to insure maritime employees under both the LHWCA and Jones Act. Since employees are not entitled to double

recovery, it is not clear why employers should be required to pay full insurance premiums for coverage under both statutes. But in any event, this Court rejected a similar argument in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715 (1980), in the context of state workers' compensation remedies. The Court noted that "[t]he line that circumscribes the jurisdictional compass of the LHWCA—a compound of 'status' and 'situs'—is not less vague than its counterpart in the pre-'twilight zone' *Jensen* era." *Id.* at 725. Similarly, it may be difficult to determine in advance whether a particular employee falls within one of the LHWCA's occupations. See, *e.g.*, *Sharp* v. *Wasau Ins. Co.*, 917 F.2d 885, 887 (5th Cir. 1990) (rejecting determination that injured employee was a longshoreman). Thus, even under petitioner's approach, employers often could not rule out the possibility of Jones Act liability.

B. Under Established Principles of Issue Preclusion, Only an Adjudication Under the LHWCA That an Employee Is Not a Crew Member Precludes Litigation of a Jones Act Claim

Petitioner implies (Pet. Br. 9), and its amicus Shipbuilders Council of America expressly argues (Br. 21-23), that an employee's receipt of benefits under the LHWCA should preclude any subsequent litigation under the Jones Act. Under established principles of issue preclusion, however, respondent's acceptance of voluntary LHWCA payments does not preclude subsequent litigation of his Jones Act claim. Only if the question is actually litigated, and it is adjudicated that an employee is not a crew member, is the employee precluded from litigating a Jones Act claim. See, *e.g.*, *Boatel, Inc.* v. *Delamore*, 379 F.2d at 855; 4 A. Larson, *supra*, § 90.51(c), at 16-

519. See generally Restatement (Second) of Judgments § 27 (1982). It is in this sense that the LHWCA is not "a stepping stone on the way to a jury award." *Fontenot* v. *AWI, Inc.*, 923 F.2d 1127, 1133 & n.41 (5th Cir. 1991) (citing *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 480-482 (1982)). To go beyond the rules of issue preclusion in this context, and to apply some more draconian election-of-remedies rule to bar Jones Act relief, would be wholly inappropriate. As a leading commentator has observed, it "would undermine and prejudice the operation of this protective public program if the claimant were put in the position of risking the loss of other valuable rights, such as those under the Jones Act, by the mere fact of accepting or invoking this basic system of compensation" under the LHWCA. 4 A. Larson, *supra*, § 90.51(b), at 16-512.

In accordance with these principles, it is "universally accepted" that an employee who receives voluntary payments under the LHWCA, see 33 U.S.C. 914(a), 20 C.F.R. 702.231, is not barred from subsequently seeking relief under the Jones Act. 4 A. Larson, *supra*, § 90.51(a), at 16-507. See, *e.g.*, *Simms* v. *Valley Line Co.*, 709 F.2d 409 (5th Cir. 1983); *Robertson* v. *Donovan*, 219 F. Supp. 364 (E.D. La. 1963); *Lawrence* v. *Norfolk Dredging Co.*, 194 F. Supp. 484 (E.D. Va. 1961); *Chesser* v. *General Dredging Co.*, 150 F. Supp. 592 (S.D. Fla. 1957). Similarly, if a claim under the LHWCA is not adjudicated, the claimant is not precluded from seeking Jones Act relief. *Boatel, Inc.* v. *Delamore*, 379 F.2d 850 (5th Cir. 1967); *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953); *Oliver* v. *Ocean Drilling & Exploration Co.*, 222 F. Supp. 843 (W.D. La. 1963); *Boyles* v. *Humble Oil & Refining Co.*,

209 F. Supp. 857 (E.D. La. 1962). Absent an adjudication that satisfies the prerequisites for issue preclusion, there is nothing "sinister" about an employee who accepts benefits under the LHWCA and then proceeds to litigate a Jones Act claim. *Boatel, Inc.* v. *Delamore*, 379 F.2d at 854.

C. Petitioner's "Primary Jurisdiction" Argument Is Without Merit

Petitioner advances the novel proposition (Pet. Br. 40-45) that, where an employee is arguably covered by the LHWCA, the district court should "stay the Jones Act proceeding until the plaintiff has obtained a final LHWCA agency determination that he is a 'master or member of a crew,' *i.e.*, a Jones Act 'seaman.'" *Id.* at 44. We believe this argument is not fairly embraced within the question presented for review, which is addressed to whether those in the enumerated occupations are *per se* excluded from Jones Act coverage. See Sup. Ct. R. 24.1(a). But in any event, the argument is without merit.

Petitioner relies (Br. 44 n.155) on the exclusive remedy provision of the Federal Employees Compensation Act (FECA), 5 U.S.C. 8116(c). Petitioner is correct that, where there is a substantial question of coverage under FECA, the courts will stay or dismiss an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, until the Department of Labor determines whether FECA applies. See, *e.g.*, *DiPippa* v. *United States*, 687 F.2d 14, 20 (3d Cir. 1982); *Avasthi* v. *United States*, 608 F.2d 1059, 1060 (5th Cir. 1979). But petitioner is incorrect in drawing an analogy between the FECA/FTCA relationship and the LHWCA/Jones Act relationship. FECA—unlike the LHWCA—contains an

"unambiguous and comprehensive" provision barring any judicial review of the Secretary's determination of FECA coverage. *Lindahl* v. *OPM*, 470 U.S. 768, 780 (1985).[15] Thus, the courts have no jurisdiction over FTCA claims where the Secretary of Labor determines that FECA applies to the alleged injury. *Grijalva* v. *United States*, 781 F.2d 472, 474 (5th Cir.), cert. denied, 479 U.S. 822 (1986); *Heilman* v. *United States*, 731 F.2d 1104, 1109-1110 (3d Cir. 1984); *DiPappa*, 687 F.2d at 16.

In the LHWCA/Jones Act context, in contrast, Congress has assigned no such dominating role to the Secretary of Labor. The LHWCA contains no bar to judicial review, but instead provides for resolution of factual disputes by ALJs, review by the Benefits Review Board and, thereafter, by the courts of appeals. 33 U.S.C. 919(d), 921(b). *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 (1940), on which petitioner relies (Pet. Br. 41), stands only for the proposition that a fact-finder's determination of crew-member status must be accepted if it is supported by substantial evidence. See, *e.g.*, *Norton* v. *Warner Co.*, 321 U.S. at 571-573 (overturning deputy commissioner's determination that a bargeman was not a seaman). Thus, there is nothing anomalous about having a jury decide seaman status under the Jones Act.

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[15] Section 8128(b) provides that

> [t]he action of the Secretary or his designee in allowing or denying a payment under [FECA] is—(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

In addition, the Secretary is to decide all questions "arising under" FECA. 5 U.S.C. 8145.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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